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(4)

No. 06-427

In The
Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,

Petitioner,

v.

BRENTWOOD ACADEMY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amicus will address the following questions, as framed by the parties' reasons for granting a writ of certiorari and now presented on merits review:

I. Whether this Court should reconsider and overturn its holding in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), which constituted a break with existing precedent and created an ad hoc approach to "state action" determinations that is incapable of principled application.

II. Whether the Sixth Circuit erred in determining the relative substantial importance of "competitive equity" in scholastic and amateur sports.

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INTEREST OF *AMICUS CURIAE*[1]

The National Collegiate Athletic Association ("NCAA") is a voluntary association composed of colleges, universities and athletic conferences throughout the United States. Its purpose is, and always has been, to promote amateur athletics in conjunction with higher education. Membership in the NCAA is purely voluntary and it is funded exclusively by membership dues and income generated in connection with NCAA events and championships. The NCAA does not receive any federal or state governmental funding or subsidy.

Much like the members of Petitioner in the present case, NCAA member institutions have developed a set of rules by which all members agree to abide. These rules are designed to ensure that: (1) athletics are subordinate to academics; (2) student athletes are not subject to exploitation; and (3) there is and remains competitive equity among member institutions in NCAA sanctioned sporting events. Member institutions also developed an effective manner of policing themselves and determining uniform and appropriate corrective action when a member seeks to gain an unfair advantage or otherwise fails to follow the rules adopted by the membership.

Because of the voluntary nature of membership in the NCAA, its inclusion of both public and private member institutions, and the absence of any individual state

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, *Amicus* states that no counsel for any party to this cause authored this brief in whole or in part, and no person or entity other than *Amicus* made any monetary contribution to the preparation or submission of this brief. In addition, *Amicus* has sought and received consent from counsel for Respondent to submit this brief.

delegation of authority or regulatory power, this Court has previously recognized that the NCAA is not a "state actor." *NCAA v. Tarkanian*, 488 U.S. 179, 193 (1988). The NCAA has relied on *Tarkanian* in pursuing its mission as well as in resolving disputes with member institutions, their agents and employees. But this Court's decision in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), and the decision below in this case, make it clear that the "entwinement" standard for determining when a private entity can be a state actor has only confused, if not implicitly supplanted, this Court's long-standing precedent and has proven incapable of principled application. For this reason, *Amicus* joins Petitioner in requesting that this Court reconsider and overturn its decision in *Brentwood*.

SUMMARY OF ARGUMENT

1. *The "entwinement" test that has emerged from this litigation is predicated on facts that would not give rise to a finding of state action under this Court's long-standing jurisprudence and, therefore, is an abrupt and unwarranted departure from that precedent.* This Court's initial determination that the Tennessee State Secondary Athletic Association ("TSSAA") is a "state actor" was not founded on any traditional notion of state action as previously understood by this and other courts. Indeed, following established precedent, the Sixth Circuit first found that the TSSAA was not a state actor because, among other things, it is a private, non-profit and voluntary association of both public and private schools that does not receive any state funding. This Court reversed, creating a new "entwinement" standard and holding that the TSSAA

was so "entwined" with the State of Tennessee that it had become a state actor. This Court based its finding primarily on a non-binding, ineffectual rule of the Tennessee State Board of Education that had merely recognized the TSSAA's historical and beneficial role in the promotion and oversight of interscholastic athletics. Because that rule had no practical effect on the actions of either the TSSAA or the State, because the State had no authority to delegate any power to the TSSAA concerning athletics, and because the so-called rule was repealed prior to the conduct complained of by Brentwood Academy in this litigation, the actions of the Board of Education could never have amounted to state action under any previously recognized standard. Likewise, the Court's attribution of state action to the TSSAA's collection of gate receipts as public "funding" finds no basis in existing law. Only through fashioning the brand-new, undefined (and therefore expansive) notion of entwinement could the TSSAA be transformed from a voluntary private association into a state actor.

2. *Lower court confusion over the meaning and application of the "entwinement" test has proven it incapable of principled application, subverting the purpose of limits on state action and leading to present and future protracted litigation.* The term "entwinement" was never defined by the Court to guide lower courts, nor does it appear in this Court's prior state action jurisprudence. As such, "entwinement" represents a new, greatly expansive test, which leaves voluntary associations such as Petitioner, *Amicus* and others lost in a sea of doctrinal uncertainty. Both courts and commentators have expressed concern that the notion of "entwinement" will be an exception to the traditional restraints of the state action

doctrine that will effectively swallow the whole. Already, the United States Court of Appeals for the Second Circuit has seemingly applied the ill-defined bounds of "entwinement" to encompass *Amicus*, in direct conflict with an express ruling to the contrary by this Court. It is becoming increasingly clear that the "entwinement" test leaves private individuals and organizations such as Petitioner and many others unable to know whether they will be held state or private actors until after discovery and motion practice, or – as in the case at bar – even after appellate review. Any such standard is inherently unworkable and only prone to spawn far more litigation than it might hope to avoid.

3. *Following remand from this Court, the Sixth Circuit's attempt to apply First Amendment and Due Process principles to the activities of the TSSAA further demonstrates that the TSSAA is not a state actor.* Following this Court's finding that the TSSAA is as a state actor, upon remand, the Sixth Circuit had virtually no guidance as to how to glean and apply the constitutional implications that follow from this conclusion. The Sixth Circuit's awkward imposition of intermediate First Amendment scrutiny and Due Process analysis upon such matters as alleged high school recruiting violations only demonstrates the practical and theoretical fallacies inherent in treating the TSSAA, and similar associations, as state actors.

There exists no meaningful precedent for distinguishing alleged violations for pre-matriculation contact with student athletes (as alleged here) from coaches complaining to officials about "bad calls," shouting epithets, or other conduct that may violate an association's rules. The folly of the Sixth Circuit's First Amendment analysis is perhaps best demonstrated by its attempt to prioritize and

define what athletic purposes serve a "substantial state interest." In this regard, the Sixth Circuit's failure to recognize the importance of competitive equity in sports, as well as in any competitive activity – even those in which there is a state interest – well illustrates that organizations such as the TSSAA are best suited to self-determine their own means and ends, not state legislatures, courts or the Constitution. In other words, this case provides an example of what happens when state action is defined too broadly. Where, as here, there can never be a controlling state interest precisely because the action at issue is not state action – even though the interest itself may be very substantial to those parties legitimately concerned.

ARGUMENT

This case presents a question of enduring national importance; that is, should the criteria for actions deemed "fairly attributable to the State," *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), be expanded beyond their reasonable and traditional limits, so that any private person or entity alleged to be somehow "entwined" with the State inevitably becomes a "state actor"? This Court's opinion in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001) ("*Brentwood I*"), effectively answered this question in the affirmative. In so doing, the Court ignored established standards for determining state action, creating instead a brand-new, undefined and expansive doctrine of "entwinement." Confusion over the meaning and application of *Brentwood I* has caused the Sixth Circuit (and other courts) to stretch the

concept of state action far beyond its traditional and well-established meaning.

The facts and procedural history below have been extensively briefed by the parties and need not be repeated by *Amicus*. However, a few essential points bear emphasis. The Tennessee Secondary School Athletic Association ("TSSAA") is a private, non-profit membership corporation organized to promote and regulate sport among public and private high schools that volunteer to become members. 531 U.S. at 291. The association is supported solely by membership dues and gate receipts and receives no state funding or other subsidy. *Id.* The TSSAA's governing structure consists of secondary school principals, assistant principals and superintendents from member schools, both public and private, none of whom are paid by the State in this capacity. *Id.*[2] The State charges a fee to the TSSAA for its use of any state-owned facilities, and does not exempt it from state taxation. *Id.* Finally, no Tennessee law purports to authorize the State to oversee or regulate interscholastic athletics, nor does the State delegate such authority to the TSSAA. *Id.* Prior to *Brentwood I*, upon first considering this case, the Sixth Circuit had little trouble concluding that "[t]hese facts make clear that the TSSAA is not an arm of the government." *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 180 F.3d 758, 762 (6th Cir. 1999). Turning to well-established "contours of the state action doctrine," under *Blum v. Yaretsky*, 457

[2] As noted by the dissent in *Brentwood I*, while at the time in question the TSSAA's Board of Control consisted of employees of public schools, there is nothing that prevents private school officials from election to the Board and, in any event, Board members are charged with acting on behalf of all member schools rather than their individual institution. *Id.* at 307 (Thomas, J., dissenting).

U.S. 991 (1982), *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and *Rendell-Baker v. Kohn*, 457 U.S. 839 (1982), the Sixth Circuit found that the TSSAA could not be regarded as a state actor under the three existing standards articulated by this Court. 180 F.3d at 763. First, finding that regulation of interscholastic sport is not a power traditionally within the province of the state (and acknowledging the unanimity of courts on this point), the Court of Appeals correctly found that the TSSAA did not meet the "public function test" necessary to find state action. *Id.* Second, the court found no indicia of "state compulsion," holding that the record was absent of any evidence that the State so "coerced or encouraged" the TSSAA that its decisions "must be regarded as the choice of the state." *Id.*

In rejecting the "compulsion" rationale, the Circuit Court found irrelevant the fact that the Board of Education had once promulgated a subsequently repealed resolution "designating" the TSSAA to conduct interscholastic activities. *Id.* at 764. Aside from the fact that the State has never itself played such a role, the Sixth Circuit found that such a meaningless proclamation was alone insufficient to tie the actions of the TSSAA inextricably to the State. *Id.* (citing *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974)). (This issue finds its significance from the fact that the majority in *Brentwood I* relied heavily on what is tantamount to the Board's "non-binding resolution" in finding "entwinement" between the TSSAA and the State of Tennessee. 531 U.S. at 300-01.) Third, and finally, the Sixth Circuit also rejected the argument that TSSAA may be regarded as a state actor under the "symbiotic relationship" test for essentially the same reason – the absence of any evidence of "significant encouragement,

either overt or covert, that the choice must in law be deemed to be that of the State." 180 F 3d at 764.

Applying decades-old precedent of this Court and its state action doctrine, the Sixth Circuit reached the inevitable conclusion that, under the facts at bar, the TSSAA could not be fairly regarded as a state actor under any established framework. *Id.* at 766. This holding was perfectly consistent with this Court's state action jurisprudence, which cautions against attaching the State's "badge of authority" to private actors, because the state action requirement "preserves an area of individual freedom by limiting the reach of federal law." *Lugar*, 457 U.S. at 936. The holding also provided other private associations that govern voluntary athletic (and similar) activities, such as the NCAA, with continuity in the law, reaffirming this Court's ruling in *NCAA v. Tarkanian*, 488 U.S. 179 (1988).

Eschewing its own well-established precedent, by a 5-4 vote, this Court reversed the Sixth Circuit in *Brentwood I*, finding, for the first time, that an undefined showing of "entwinement" was sufficient to establish state action. 531 U.S. at 296-97. As noted by the dissent, the term "entwinement" appears nowhere in this Court's previous state action jurisprudence. *Id.* at 312-13. (Thomas, J., dissenting). Although acknowledging its 1982 line of cases, *id.* at 298, the majority opinion opts not to apply the standards announced in those cases, but instead relies on two tenuous threads between the TSSAA and the State to find entwinement.

First, the majority created an artificial nexus between the TSSAA and the State by citing the 1972 proclamation by the Tennessee Board of Education recognizing the

TSSAA's historical role in overseeing high school athletics. *Id.* at 293-94. Apart from the fact this "rule" was repealed in 1996, one year before the dispute at hand, *id.*, the majority mistakenly characterizes the Board's action as a "delegation" to regulate athletics "in lieu" of "its own authority." *Id.* at 291. In fact, no Tennessee law ever granted the Board any such authority and nothing in the record suggests that this rule was anything more than the equivalent of a non-binding resolution or legislative proclamation. As further noted by the dissent, "[t]here is no indication that the TSSAA invited this resolution or that the resolution in any way altered the actions of the TSSAA or the State following its adoption in 1972." *Id.* at 308 n.2 (Thomas, J., dissenting). In this regard, the resolution was nothing like the kind of close state-nexus connection required by *Blum, Lugar* and *Rendell-Baker.*

The only other arguably relevant State-Association tie evident in the majority opinion is the purported financial relationship created between the TSSAA and Tennessee. *Id.* at 299. The Court concluded that "public schools have largely provided for the Association's financial support," *id.*, based upon the supposition that "[t]he Association thus exercises the authority of the predominantly public schools to charge for admission to their games; the Association does not receive this money from the schools, but enjoys the schools' moneymaking capacity as its own." *Id.* This Court has never before found state action based upon a similar, "indirect financial benefit" basis. To the contrary, it has expressly rejected it. *See NCAA v. Smith*, 525 U.S. 459, 468 (1999) (NCAA not a state actor as the result of receiving dues from members who receive federal financial assistance); *see also Rendell-Baker*, 457 U.S. at 843 (such a "fiscal relationship with the State is not different than

that of many contractors performing services for the government."). In the words of the *Brentwood I* dissent: "The TSSAA provides a service – the organization of athletic tournaments – in exchange for membership dues and gate fees, just as a vendor could contract with public schools to sell refreshments at school events. Certainly the public school could sell its own refreshments, yet the existence of that option does not transform the service performed by the contractor into state action." 531 U.S. at 311 (Thomas, J., dissenting).

In light of the questionable state action factors identified by the majority, and because of the absence of any meaningful definition of what else might constitute entwinement, *Brentwood I* remains an inscrutable and ultimately unworkable precedent. Further, it disregards (and perhaps eviscerates) the fundamental holding of *Tarkanian* and leaves associations such as the TSSAA, the NCAA and any similarly situated entity foundering in uncertainty.

Every bit as disturbing, this Court's holding in *Brentwood I* has implications reaching far beyond the First Amendment and Due Process concerns at issue in the present case. If allowed to stand, it would impose an unknown panoply of constitutional obligations on heretofore private actors under the Fourth, Fifth, Sixth and Fourteenth Amendments. Accordingly, in addition to the recent, direct evidence that *Brentwood I* is incapable of principled application, this Court should also consider the vast uncertainty that future courts and litigants face in confronting a regime in which an entity may well be unaware it qualifies as a state actor until litigation, following discovery or, ultimately, following motion practice or even appellate resolution.

I. *Brentwood I* Represented an Abrupt and Unwarranted Departure from this Court's State Action Jurisprudence

The imposition of constitutional obligations on private individuals and entities has been, at best, historically problematic. The early, extremely narrow view of what could amount to state action, *see United States v. Cruikshank*, 92 U.S. 542 (1876); *Civil Rights Cases*, 109 U.S. 3 (1883),[3] eventually gave way to a broader approach, in which courts looked toward whether private action in reality was performing a "public function." *See, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (holding that a "company town," having been allowed by the state to perform all of the functions and activities normally within the province of a city, must adhere to the First and Fourteenth Amendments). At the same time, in making this determination, this Court has rejected the sort of "balancing" test that would leave potential state actors no understandable basis for being classified as such. *See, e.g., Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978).

A clear standard, capable of consistent and fair application, eventually emerged from three benchmark cases, all decided in 1982. First, in *Blum*, 457 U.S. 991, this Court rejected the notion that individuals may be subject to constitutional restraints merely because some of their activities or policies are regulated by the government.

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[3] Of course, in their historical context of the Reconstruction era, these cases presented extreme examples of the failure to find state action in the face of blatant assaults on the rights of freed slaves by private actors who were – at a minimum – acting with the tacit approval or even open encouragement of the State.

In *Blum*, this Court found that state penalties imposed on nursing homes as the result of decisions made by such facilities and their physicians did not transform either into state actors, as they were not performing any "public function." *Id.* at 1004. *Blum* established an unequivocal guiding principle that, in every case, courts must determine whether an action "can fairly be attributed to the State." *Id.*; *see also Jackson*, 419 U.S. at 352.

The admonition to restrain from too readily clothing a private actor under the shroud of state action is equally evident in *Lugar*, 457 U.S. 922. While the narrow question in *Lugar* concerned the involvement of state officials in the prejudgment attachment process instituted by private creditors, its wider holding created a second standard for determining state action as recognized here by the Sixth Circuit in its first panel opinion; that is, whether an entity may be deemed a state actor because it has received "significant aid," encouragement or enabling by state officials so as to be acting under color of state law. *Id.* at 936. The *Lugar* test does not examine whether a private individual "performs a traditional function reserved to the states," but instead asks whether his conduct is *significantly* promoted in some way that would otherwise not be possible without assistance of the State. As the Sixth Circuit originally found, in this case, the ceremonial nod of approval once given by the State Board of Education to the TSSAA regarding *its* oversight with respect to secondary school athletics comes nowhere near meeting this well-established standard. 180 F.3d at 763.

Finally, this Court previously recognized a third framework for defining who is a state actor in *Rendell-Baker*, 457 U.S. 839. Often referred to as the "symbiotic relationship" test, this approach begins with the central

question posed by *Blum*: whether the alleged infringement on federal rights is fairly attributable to the state? *Id.* at 839-43. This, always, is the ultimate inquiry. The nuance presented by the "symbiotic relationship" notion is simply whether there is a nexus of mutuality such that the private actor can fairly be said to act as a proxy for the State. *Id.* Neither extensive state regulation, *e.g.*, *Blum*, 457 U.S. at 1004, nor state funding is alone sufficient to support a finding of a symbiotic relationship. *Id.; Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972); *Crowder v. Conlan*, 740 F.2d 447, 450-51 (6th Cir. 1984). In the present case, it is undisputed that the TSSAA was not subject to State regulation *of any nature*, nor was it the recipient of one penny of State funding. Under any application of this standard, the TSSAA cannot be fairly said to qualify as a "state actor."

These three frameworks all operate to reach the same basic determination whether it is the State, not the individual, that is actually behind the challenged conduct. More importantly, they were crafted to ensure this finding is made with the utmost care, to limit the reach of federal law upon private actors and to "avoid the imposition of responsibility on a State for conduct it could not control." *Tarkanian*, 488 U.S. at 191. Once again, it is undeniable that the State of Tennessee did not and could not coerce (or, conversely, prohibit) the TSSAA from promulgating or enforcing its own rules among its voluntary membership.

Because the TSSAA does not satisfy any of these three well-established tests, by this Court's pre-existing precedent, its conduct could not "be fairly attributable to the State." *Blum*, 457 U.S. at 1004. In finding otherwise, the majority in *Brentwood I* crafted an entirely new test: whether the conduct of the individual and the State are

sufficiently "entwined" to constitute state action. 531 U.S. at 288-89. The majority did not actually define what might constitute "entwinement," nor did it purport to tie that concept to any of the three traditional frameworks. *See Id.* at 312 (Thomas, J. dissenting). As such, entwinement created a new doctrine of state action, without the prophylactic constraints developed under prior law designed to limit state-action status solely to those private actors whose conduct can be "fairly attributed" to the State.

II. The *Brentwood I* State Action Framework is Not Capable of Principled Application

The undefined, amorphous entwinement test announced in *Brentwood I* has resulted in pronounced confusion among the lower courts and robust criticism by commentators. Lower courts have variously described the entwinement doctrine as "labyrinthine," "nebulous," "vague," and a "freewheeling *gestalt* analysis."[4] Lower courts have become confused even about how many different state action tests there actually are. *See Wang v. Blue Cross Blue Shield Ass'n,* 55 F. App'x 802, 803 (9th Cir. 2003) ("seven approaches to the issue"); *Keeling v. Schaefer,* 181 F. Supp. 2d 1206 (D. Kan. 2001) (four tests);

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[4] *See* Petition for Writ of Certiorari, at 28 (citing *Leshko v. Servis,* 423 F.3d 337, 338 (3d Cir. 2005) ("labyrinthine"); *Kirtley v. Rainey,* 326 F.3d 1088, 1094-95 (9th Cir. 2003) ("vague"); *Tancredi v. Metro. Life Ins. Co.,* 378 F.3d 220, 230 (2d Cir. 2004) ("nebulous"); *Crissman v. Dover Downs Entmt.*, 289 F.3d 231, 233 (3d Cir. 2002) ("little is straightforward"); *Willis v. Town of Marshall,* 293 F. Supp. 2d 608, 615 (W.D.N.C. 2003) ("anything but clear and consistent"), *rev'd in part on other grounds,* 426 F.3d 251 (4th Cir. 2005); *Gross v. Fond Du Lac County Agric. Soc'y, Inc.,* 2005 U.S. Dist. LEXIS 19537, at *23 (E.D. Wis. Sept. 6, 2005) ("freewheeling *gestalt* analysis")).

Sabeta v. Baptist Hosp. of Miami, Inc., 410 F. Supp. 2d 1224 (S.D. Fla. 2005) (three tests). This reaction should not be surprising; it was bluntly predicted by the dissent:

> Because the majority never defines "entwinement," the scope of its holding is unclear. If we are fortunate, the majority's fact-specific analysis will have little bearing beyond this case. But if the majority's new entwinement test develops in future years, it could affect many organizations that foster activities, enforce rules, and sponsor extracurricular competition among high schools – not just in athletics, but in such diverse areas as agriculture, mathematics, music, marching bands, forensics, and cheerleading. Indeed, this entwinement test may extend to other organizations that are composed of or controlled by, public officials or public entities, such as firefighters, policemen, teachers, cities, or counties.

Id. 314-15 (Thomas, J., dissenting).[5] Without question, as the dissent notes, the new doctrine of "entwinement" extends far beyond the facts of this case and could be used to make "public" many institutions and activities long regarded as private. *See, e.g., D'Alessio v. Securities and Exchange Commission*, 380 F.3d 112 (2d Cir. 2004) (noting that the New York Stock Exchange has never been held to

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[5] Scholarly concern over the imminent expansion of *Brentwood I* beyond the facts of this case has already begun. *See* Donna M. Nagy, *Playing Peekaboo With Constitutional Law: the PCAOB And Its Public/Private Status*, 80 Notre Dame L. Rev. 975 (2005) (questioning the propriety and workability of applying *Brentwood* to the newly created Public Company Accounting Oversight Board); Lisa J. Chadderdon, *No Political Speech Allowed: Common Interest Developments, Homeowners Associations, and Restrictions on Free Speech*, 21 J. Land Use and Envtl. Law 233, 242 (2006) (noting that, following *Brentwood*, "there is no single, clear state action doctrine.").

be a state actor); *Desiderio v. NASD*, 191 F.3d 198, 206-07 (2d Cir. 1999) (National Association of Securities Dealers ("NASD") not a state actor); *see generally United States v. Int'l Bhd. of Teamsters*, 941 F.2d 1292, 1295 (2d Cir. 1991), *cert. denied*, 502 U.S. 1091 (1992). In each of these cases, *Brentwood* might easily be read to transform these private associations with voluntary members into state actors merely by virtue of some amorphous "entwinement" with the state. For example, the oversight role the NASD has played with its members is at least as comprehensive as the role played by the TSSAA. Certainly, that role has at least been "acknowledged" or recognized by the SEC, *see ibid.*, inasmuch as the Tennessee Board of Education has acted similarly, yet NASD has never been held to be a state actor – yet.

Commentators likewise have been harshly critical of the new "entwinement" framework. *See* Kevin P. Braig, *A Game Plan to Conserve the Interscholastic Athletic Environment After LeBron James*, 14 Marq. Sports L. Rev. 343, 382 (2004) ("the reasoning in *Brentwood Academy* that a state high school athletic association such as the OHSAA is a 'state actor' is based on an intuitive, ad hoc doctrine grounded on a 'vague notion of entwinement. The Court's decision *is conspicuously not based on prior conceptions of the state action doctrine. . . .*'") (emphasis added); *see also* John Fee, *The Formal State Action Doctrine and Free Speech Analysis,* 83 N.C.L. REV. 569, 587 (2005) (characterizing "entwinement" as "so malleable that no outcome is excluded . . . artificial and incapable of principled application"); Alan R. Madry, *Statewide School Athletic Associations and Constitutional Liability: Brentwood Academy v. Tennessee Secondary School Athletic Association*, 12 MARQ. SPORTS L. REV. 365 (2001) ("incoherent," "ad hoc," and

"rides against a strong contrary tide"); Michael L. Wells, *Identifying State Actors in Constitutional Litigation: Reviving the Role of Substantive Context,* 26 CARDOZO L. REV. 99, 125 (2004) ("the Court appears to have gone astray").

A most recent, and extremely troubling, attempt to apply *Brentwood* can be found in the Second Circuit Court of Appeal's decision in *Cohane v. The National Collegiate Athletic Association*, No. 05-5860, 2007 WL 247710 (2d Cir. Jan. 25, 2007) ("*Cohane*"). With a mere one-line, out-of-context quote citing *Brentwood I*, the Second Circuit appears to read that case to *sub silentio* overturn – or at least unrecognizably alter – this Court's longstanding precedent in *Tarkanian*. Slip. Op. p. 4. In *Cohane*, the District Court had dismissed plaintiff's claim that the NCAA is a state actor in accord with the clearly announced criteria of *Tarkanian*[6]; that is, that the NCAA is a voluntary organization independent of any one state, composed of public and private institutions, receiving its funding from member dues and gate receipts, and without any authority or powers normally reserved to the State. Purporting to apply *Brentwood I* (and, presumably, using its new entwinement standard), the Second Circuit theorized that the plaintiff *might* be able to plead facts that somehow fit within this essentially undefined framework. *Id.* In so doing, the Second Circuit attempted to distinguish *Tarkanian* by reliance on *dicta* as the supposed alignment of interests between UNLV and Coach Tarkanian or the bench trial accorded Tarkanian but not

[6] *Amicus* understands that this Court is well aware of the facts and the holding of *Tarkanian* and will discuss only those portions of the opinion necessary to its argument.

Cohane. Slip Op. at p. 5. However, *none* of the Second Circuit's ersatz "distinguishing features" had played any part in this Court's holding in *Tarkanian*. In effect, the Second Circuit held that, under certain unknown and unknowable circumstances left open by *Brentwood I* and contrary to *Tarkanian*, the NCAA may or may not be a state actor. This cavalier disregard of *Tarkanian* in favor of the all enveloping state action "entwinement" doctrine is all the more disturbing because it did so in a "summary opinion;" one that is unpublished and, supposedly, an unremarkable statement of well-accepted law. *See* 2d Cir. L.R. 0.23. In reality, it is nothing of the sort.[7]

Justice Thomas' dissent in *Brentwood I* eerily predicted the unrestrained expansion of state action evidenced by *Cohane*. In refuting the majority's invocation of *Brentwood I* as being ostensibly consistent with *Tarkanian*, the dissent observed:

> Indeed, the reference to *Tarkanian* is ironic because it is not difficult to imagine that application of the majority's entwinement test could change the result reached in that case, so that the National Collegiate Athletic Association's actions could be found to be state action given its large number of public institutional members that virtually control the organization.

531 U.S. at 314 n. 7 (Thomas, J., dissenting).

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[7] Although it is not cited in *Cohane*, the Second Circuit's unchecked application of *Brentwood* is presaged by its opinion in *Tancredi v. Metropolitan Life Insurance Co.*, 378 F.3d 220, 229 (2d Cir. 2004), which holds that after *Brentwood*, as a practical matter, there can virtually never be a frivolous or unfounded allegation of state action under the expansive "entwinement" framework. *Cohane* has proven the Circuit true to its word.

As foretold by the dissent, *Cohane's* reliance on *Brentwood I* well illustrates the problems inherent in announcing a new rule without form or substance. Indeed, the new standard effectively allowed the Second Circuit to all but disregard the facts central to *Tarkanian's* holding: that the NCAA has "no governmental powers to facilitate its investigation . . . no power to subpoena witnesses, to impose contempt sanctions, or to assert sovereign authority over any individual." 488 U.S. at 197. Because the TSSAA's authority is similarly limited, the Sixth Circuit's state action holding here likewise contravenes *Tarkanian.* The only logical way to square this disregard for the uncontroverted facts is to presume that the lower courts read *Brentwood I* as substantially altering, if not entirely overruling, the framework articulated by *Tarkanian.*

As *Cohane* illustrates, *Brentwood I* gives bodies such as the NCAA, Petitioner or virtually any private quasi-regulatory body conceivably "entwined" with the State no pragmatic, meaningful way of knowing when or how it may be found to be a state actor. With an almost unrestricted universe of possible facts, an entity could be found to be a state actor during the course of an administrative proceeding, following discovery or motion practice in litigation or, as was the case here, following a determination on appeal.

Another practical implication of *Brentwood I* can be seen by examining the facts of the case at bar. If the TSSAA is indeed a state actor, it will be faced with numerous Hobbesian choices. For example, should it be subjected to any level of First Amendment scrutiny, would courts limit *Brentwood I* to the recruiting violations asserted here, or would private schools be able to challenge standards governing the fight songs played by "pep bands,"

banners flown at athletic events, controversial calls (or player/coach ejectments) by officials, or even the rules of a particular sport? As noted by the TSSAA in its Petition for Certiorari, *Brentwood I* places a voluntary association of private actors in the incongruous, unfair position of having less ability to enforce the rules its own members have adopted than the State itself would have to enforce speech restrictions against its employees. *See* Petition for Certiorari, at 27 (citing *Snepp v. United States*, 444 U.S. 507 (1980)). Likewise, faced with the unavoidable uncertainty of the "entwinement" doctrine, bodies such as the TSSAA would have strong incentive to exclude the Brentwood Academies of the world, a choice that itself is both undesirable and fraught with other potential legal consequences. *Id.* at 30. The consequences of not doing so, however, would be equally deleterious, leaving such entities to face unfettered litigation they can neither afford nor wait to wend its way through a maze of courts. *See* Braig, *supra,* at Sports L. Rev. 343, 364-65.

In precisely the same manner, the Sixth Circuit's finding of a Due Process violation raises the specter of still additional uncertainty. Perhaps because the TSSAA is a voluntary association comprised of secondary schools that have *agreed* to abide by a set of rules for resolving grievances, the Sixth Circuit frankly conceded that "[t]here is no applicable precedent that describes the precise process a school such as Brentwood should receive from a state athletic association. . . . " *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 442 F.3d 410, 436 (6th Cir. 2006). There is good reason for this. The Sixth Circuit could find no other instance of a wholly voluntary, private and self-governing organization being subject to the Due Process constraints imposed by *Brentwood I*. Instead, it was reduced to searching for guidance from

such inapposite authority as *Parratt v. Taylor*, 451 U.S. 527 (1981). 442 F.3d at 433. Comparing the normative procedural hearing standards accorded by an unquestionable state actor – a corrections institution in *Parratt* – with those in the case at bar only serves to underscore the inherent defect in treating private, contractually mandated regulatory schemes as public.

Put simply, *Brentwood I* was what the dissent said it was: a misguided attempt to articulate a new, deeply flawed standard for determining state action. As such, the principle of *stare decisis* does not require blind deference to *Brentwood I* for at least three compelling reasons. First, because the case "involved an interpretation of the Constitution, and the claims of *stare decisis* are at their weakest in that field, where [the Court's] mistakes cannot be correct by Congress," there exists little restraint on this Court to remedy a wrongly decided decision. *See Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Fundamentally, it is within the exclusive province of this Court to determine whether state action exists sufficient to bring an otherwise private actor under the penumbra of acting under "color of law." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *United States v. Nixon*, 418 U.S. 683, 705 (1974).[8] Second, such considerations are "doubly weak" where, as here, the majority's opinion in *Brentwood I* evinces an "inability to enunciate [a] judicially discernable and manageable standard that it thought existed. . . ." *Vieth v. Jubelirer*, 541 U.S. 267, 305 (2004); *see also BMW of North America, Inc. v. Gore*, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting) (decisions insusceptible of principled application are not entitled to *stare decisis* effect); *Patterson v.*

[8] The Federalist No. 78, pp. 523, 525 "[t]he interpretation of the laws" would be "the proper and peculiar province of the courts."

McLean Credit Union, 491 U.S. 164, 173 (1989) ([W]e have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings. . . ."). Finally, stare *decisis* should not constrain this Court to act where, as here, the decision at issue departs from prior precedent.

This Court should overturn *Brentwood I* and restore its pre-existing, well-established standards for determining state action.[9]

III. Competitive Equity Is Always a Substantial, Although Not a State, Interest

In the study of civil religions, our thinkers have too much neglected sports. It is the fashion, nowadays, to swing out wildly at all established institutions, including sports. It is true that sports often tell us a great a deal about a people – but almost as tea leaves tell us about the future.[10]

* * * *

[9] As stated herein, *Amicus* believes *Brentwood I* was wrongly decided and unnecessarily casts an opaque cloud over the meaning and ordinary application of the state action doctrine. While *Cohane* provides one concrete example of this, the Second Circuit's failure to properly apply *Tarkanian* itself was in error and continues to be at issue in that litigation, wholly apart from whether *Brentwood I* is upheld. At this printing, the NCAA has moved for panel rehearing/rehearing *en banc* in that case and, if denied, intends to seek certiorari review before this Court.

[10] Michael Novak, *Endzones, Bases, Baskets, Balls, and the Consecration of the American Spirit*, Madison Books, rev'd Ed. (1994).

Nothing reveals humanity so well as the games it plays. . . . Actually, you reveal yourselves best in how you play.[11]

The Sixth Circuit's attempt to impose a First Amendment and Due Process regime upon the TSSAA, and require it to show substantial "state" interest in enforcement of its recruiting rules, only serves to illuminate the infirmities inherent in *Brentwood I*'s state action holding. In other words, this case provides a troubling example of the consequences of defining state action too broadly. In such cases, as here, there can never be a substantial *state* interest – precisely because the action at issue is not itself *state action* but, rather, action in which only the interests of private actors are pervasive and substantial.

Accordingly, the state action ruling in *Brentwood I* leaves open problematic, perhaps logically unanswerable questions. Beyond determining that the TSSAA is a "state actor," in remanding this case to the Sixth Circuit, this Court gave virtually no guidance on how lower courts should apply the constitutional mandates that follow from this conclusion. It is hardly surprising, therefore, that both District Court and the Sixth Circuit struggled with – for example – the level of scrutiny given to First Amendment restrictions in the context of interscholastic athletics.

This flaw is perhaps best exemplified by the lower court's apparent disregard for the importance of "competitive equity," *see* 442 F.3d at 427-28, a notion of fair play that transcends all sporting activities. The Sixth Circuit's holding that an interest in a "level playing field" is not comparable with what it characterized as substantial

[11] "Q," Star Trek: the Next Generation, "Hide and 'Q'", September 25, 1987 (Act One).

"state" objectives concerning academics, athletics and student exploitation, is testament to why the TSSAA, not the courts, should determine its own rules of the game.[12]

In this regard, *Amicus* respectfully suggests the second question raised by Petitioner, the substantial importance of competitive equity in interscholastic sporting events, does not turn on the Sixth Circuit's erroneous application of First Amendment law, nor does it depend on the level of scrutiny applied under that constitutional edict. Rather, the critical role played by competitive equity in all sport only serves to illustrate, in fact dispositively, that organizations governing such activities should not be held to be state actors. Courts have explicitly found that oversight of sport is not a traditional function of the state and, accordingly, the state itself has no interest in promotion or dissuasion of any specific sport objective. *See San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 545 (1987) ("[n]either conduct nor the coordination of amateur sports has been a traditional governmental function."). This, however, in no way leads to the conclusion that competitive equity is not a critical component of sport regulation or oversight by bodies constituted for this purpose. To the contrary, notions of essential fairness and equity pervade all levels of

[12] By stressing the wider import of competitive equity to all sports, the NCAA does not intend to suggest that this interest "outweighs" concerns over student-athlete exploitation and the primacy of academics in the interscholastic and intercollegiate context. All three are substantial interests that the NCAA and Petitioner share. The fact that competitive equity transcends scholastic sport – and, as noted below, sport itself – merely illustrates how ill-suited courts such as the Sixth Circuit are to evaluate and weigh these substantial interests.

sport, from little league to intramural basketball to amateur and professional sports.

The NCAA's own Constitution cites competitive equity as a fundamental purpose of the Association. *See* NCAA Const. §§ 1.2, 1.3.1 and 2.7. This is not simply an empty creed: to ensure fairness and balance among its members, the NCAA employs its own Research Staff that conducts ongoing studies of trends, data and characteristics of intercollegiate sports, including monitoring competitive equity through examination of, for example: (1) student-athlete performance; (2) race and gender demographics; (3) graduation rates; (4) the use of performance-enhancing substances; and (5) the impact of wagering and associated behaviors on collegiate sports. *See NCAA Research Staff,* http://www.NCAA.org. The NCAA consistently monitors these and other areas to promote the same three interests asserted by the TSSAA on behalf of student athletes, including providing a level playing field for all. The State plays *no* role in promoting, furthering or assisting in these goals. Yet, it is beyond any doubt that they are goals which are substantially important to amateur sport in the United States.

Not only does the State itself have no interest in the promotion or oversight of amateur athletics, *San Francisco Arts & Athletics, Inc*, 483 U.S. at 545, because the voluntary competitive bodies which do govern interscholastic activities have the real expertise in this area, states and the courts should accord great deference in their affairs. *See Mahan v. Oklahoma Secondary Sch. Activities Ass'n*, 652 P.2d 765 (Okla. 1982) ("Surely the schools themselves should know better than any one else the rules under which they want to compete with each other in athletic events").

In attempting to "micromanage" the TSSAA and second-guess its application of rules agreed to by all of its members including Brentwood Academy, the Sixth Circuit erroneously substituted its judgment for that of the one body that actually has the incentive, expertise and ability to ensure fairness: the TSSAA. As succinctly put by the Fifth Circuit Court of Appeals over twenty years ago: "We are not super referees over high school athletic programs. Questions about eligibility for competition may loom large in the eyes of youths, and even their parents. We do not disparage their interest in concluding, as here, that these issues are not of constitutional magnitude." *Hardy v. University Interscholastic League*, 759 F.2d 1233, 1235 (5th Cir. 1985); *see also NCAA v. Yeo*, 171 S.W.3d 863, 863-64 (Tex. 2005) (citing *Hardy* with approval and holding that disputes concerning the administration of interscholastic sports are best left to schools, and are not the concern of courts or the Constitution).

There is yet another compelling reason why states (and courts) should refrain from meddling in the affairs of voluntary organizations such as the TSSAA and *Amicus*. Rules alone cannot foster competitive equity if they cannot be applied consistently. In the case of the NCAA, courts have ruled that state attempts to "overrule" its practices and procedures run afoul of the Commerce Clause. *See NCAA v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993); *NCAA v. Roberts*, No. 94-40413, 1994 WL 750585 (N.D. Fla. Nov. 8, 1994). *Miller*, for example, involved the State of Nevada's attempt to legislate around this Court's ruling in *Tarkanian*, and place state law above the NCAA's enforcement procedures. The Ninth Circuit struck down the Nevada law, holding that piecemeal state legislation attempting to regulate the NCAA's national practices and procedures

violated the Commerce Clause. *Miller*, 10 F.3d at 638. Just as the Commerce Clause prevents states from dictating differing lengths for railroad cars, so must the NCAA be afforded consistent treatment by the states to accomplish its national purpose. *Ibid.* To the great extent Petitioner regulates Tennessee athletics across the broad spectrum of different high schools, public and private, while not implicating the Commerce Clause, the TSSAA has precisely the same need for consistency which would be frustrated by different state courts reaching disparate conclusions regarding the application of its rules.

To be sure, the Sixth Circuit's failure to find a "substantial state interest" in competitive equity rested on the fundamentally flawed assumption of state action. Yet, even where state interests *are* at stake, for example in the field of anti-trust, laws and courts are committed to do precisely the same thing that the TSSAA has attempted here: make certain that competing interests are given a level playing field with no unfair advantage to either side. *See, e.g., State Oil Co. v. Kahn*, 522 U.S. 3, 14 (1997); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 726 (1988). Indeed, entire federal governmental departments such as the Securities and Exchange Commission have been created to ensure fairness in the securities markets. *See* 15 U.S.C. § 78n(e), *et seq.* Similar considerations have driven legislation and rule-making in such diverse areas as communications (*see* 47 U.S.C. § 251(c), (Communications Act of 1996); *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 488 (2002)), interstate trade (*see Maine v. Taylor,* 477 U.S. 131, 148, n. 19 (1986)), and international trade (*see* 19 U.S.C. § 1526). For similar reasons, even if the TSSAA were deemed to be a state actor, these authorities strongly suggest that any reasonable

"intermediate scrutiny" analysis would necessarily presume competitive equity to be a substantial state interest.

Among all competitive endeavors, the substantial importance played by competitive equity is readily apparent. Likewise, it is axiomatic that those most deeply concerned with fostering and preserving such equity are best suited to determine how to achieve this critical objective. By erroneously placing its own judgment above that of the TSSAA, the Sixth Circuit inadvertently proved just how unsuited the State and the courts are in making value judgments regarding the ends and means of amateur sports. The awkward application of the First Amendment "state interest" test, 442 F.3d at 427-28, merely confirms that organizations like the TSSAA cannot be contorted into "state actors" without resulting in egregious injury to their very purpose and mission.

For all of these reasons, the length of the field, the size of the ball, the number of players and who can play, the seasons of play and practice, as well as the innumerable other critical elements of sports are best left to those who organize and play them. The substantial importance of these considerations are undeniable in the world of sport; they are equally of no consequence to the State, the courts or the Constitution.

CONCLUSION

Amicus respectfully suggests that this Court's prior decision in *Brentwood I* was wrongly decided, inadvertently creating a new "state action" rule without foundation in existing precedent and which is incapable of principled application. The confusion among the lower

courts as to the meaning of "entwinement" is pronounced and quickly growing. Under the circumstances, deference to *stare decisis* can and should give way to providing private individuals and organizations such as Petitioner and *Amicus* meaningful guidance before placing upon them the burden of the many substantial Constitutional obligations intended to be imposed upon the State.

Respectfully submitted,

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